

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 29, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1013

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LARRY GEORGE,

Plaintiff-Appellant,

v.

RECORD CUSTODIAN,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Larry George appeals from an order denying him costs in an open records case. The issue is whether George should be awarded costs as authorized by § 19.37(2)(a), STATS.¹ George contends that the document

¹ Section 19.37(2)(a), STATS., provides in part, "The court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating

he received in response to his open records request was illegible and that there were other records which should have been provided to him. We conclude that George did not substantially prevail in his action because the record custodian responded timely to his request and because filing a mandamus action was unnecessary to obtain the requested record. Consequently, he is not entitled to costs. We therefore affirm.

Background

Larry George is an inmate at the Racine Correctional Institution (RCI). On October 10, 1993, he made a § 19.35, STATS., open records request of the RCI record custodian. He sought to inspect the latest RCI documents pertaining to recycled aluminum can sales and where the money received for the cans was spent.

On November 22, 1993, the record custodian replied to George's request by sending him a copy of the latest receipt for aluminum can sales, along with a copy of telephone receipts pursuant to a previous request. The record custodian also informed George that he found no documents relating to the expenditure of the aluminum can sales money.

Timely Response

The record custodian's response was timely under the circumstances of George's request. Section 19.35(4)(a), STATS., provides, "Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor."

George's request was dated October 10, 1993, and the record custodian responded on November 22, 1993. Section 19.35(4)(a), STATS., does not set forth a response deadline except that the response must be made as soon

(. . . continued)
to access to a record or part of a record under § 19.35(1)(a)."

as practicable and without delay. We conclude that in a prison setting, where George gave no reasons necessitating a shorter response, six weeks was as soon as practicable and without delay.

Substantially Prevail

Section 19.37(2)(a), STATS., provides that a requester who prevails in whole or in part is entitled to reasonable attorney fees, costs not less than \$100, and other actual costs. George did not need to bring this mandamus action to obtain a copy of the receipts from aluminum can sales. Section 19.37(1), STATS., provides that a requester may bring an action in mandamus, "if an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made" If the copy of the receipt for aluminum can sales was illegible, George should have simply reported that fact to the record custodian and requested a legible copy. George responds that he is "not required to alert the agency that he received a copy which was not readable." We disagree. Without being denied a second legible copy, we cannot say that the mandamus action was necessary to obtain a legible copy of the receipts from aluminum can sales.

We conclude that there is no connection between George's lawsuit and his receiving the information he requested. The record custodian was in the process of fulfilling George's request when George filed his mandamus action on October 27, 1993. The fact that George commenced the mandamus action before he received the documents does not convince us that the required nexus exists. The trial court did not issue the writ of mandamus until December 10, 1993. The State was not served with the writ until December 22, more than three weeks after the record custodian had provided George with all available requested records.

George has also failed to demonstrate that records exist as to expenditures of aluminum can sales money. The record shows that money from recycled aluminum cans is deposited into a general housekeeping account for all inmate services. The record of expenditures does not indicate the source of the money spent, nor does it allocate particular expenses as being paid for with money received from aluminum can sales. The record custodian correctly

responded that no documents exist concerning expenditures of aluminum can sales money.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.